Syarikat See Wide Letrik Sdn Bhd v Brunsfield Communications Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–1206 OF 2005
ZALEHA ZAHARI, ZAINUN ALI AND ZAHARAH IBRAHIM JJCA
18 FEBRUARY 2011

Civil Procedure — Appeal — Fact, finding of — Interference by appellate court — Judicial appreciation — Whether trial judge failed to appreciate that respondent had failed to call direct witnesses to contradict critical facts pointing to refusal to accept delivery — Whether trial judge failed to appreciate that respondent failed to establish how appellant had been fraudulent

Contract — Breach — Refusal to accept delivery — Appellant called on bank guarantee — Whether appellant had basis for calling on bank guarantee — Fraud — Whether respondent established that appellant had made fraudulent claim on bank guarantee

The respondent was awarded a subcontract to supply, deliver, install, test and commission the structural cabling system for a part of a government project ('the project'). By a letter of award, the respondent in turn subcontracted the works to the appellant. The appellant accepted the respondent's offer to deliver the cabling system equipment as stated in the schedule of the contract between the parties in three installments. The terms of the contract pertaining to the deliveries were to be strictly observed with the appellant liable for liquidated and ascertained damages ('LAD') of RM4,000 per day for non-compliance with these terms. The respondent's performance of its contractual obligation under the contract was secured by a bank guarantee. Under the bank guarantee the respondent was to make payment to the appellant within 90 days from the date of delivery of the equipment. The appellant claimed that the respondent had unilaterally extended the delivery dates from three installments to five installments and then resorted to constant deferment of accepting the delivery of the equipment. The appellant then made a call on the bank guarantee citing the failure of the respondent to take delivery of the equipment. The respondent commenced an action against the appellant for calling on the bank guarantee. It was the respondent's contention that the appellant had no basis for calling on the bank guarantee, because it was incumbent upon the appellant to show that the sum claimed was owing to it at the time of making a call on the bank guarantee. According to the respondent, the appellant did not have the necessary equipment to deliver to the respondent. It was the appellant's case that it was unable to perform its obligations under the contract because of the

constant requests by the respondent to defer and receive delivery. The appellant submitted that the respondent's failure to accept delivery meant that it had to continue incurring holding costs for storing the equipment in the warehouse. The trial judge found in favour of the respondent and hence the instant appeal.

Held, allowing the appeal with costs here and below:

(1) The appellant's letter making a call on the bank guarantee citing the respondent's default was not disputed. As such it was not open for the respondent to now deny and dispute breach on its part. It was clear in the circumstances of this case that the respondent had defaulted in its contractual obligations. In fact the trial judge failed to appreciate that the respondent had failed to call direct witnesses to contradict critical facts pointing to the refusal to accept delivery and/or inability to complete or proceed with its contractual obligations. The trial judge also failed to recognise the existence of motive on the respondent's part for withholding and refraining acceptance. Further, despite the findings of fact made in the appellant's favour, the trial judge misdirected himself when he ruled otherwise (see paras 68, 73, 85 & 89).

(2) The respondent, which alleged that the appellant had made a fraudulent claim on the bank guarantee, had the burden of proving the allegation of fraud beyond a reasonable doubt. However, notwithstanding the above burden the trial judge accepted the evidence of the respondent witnesses on a balance of probabilities. The trial judge had also failed to appreciate that the respondent had failed to establish how the appellant had been fraudulent (see paras 79–81 & 84).

[Bahasa Malaysia summary

Responden diawardkan subkontrak untuk membekalkan, menghantar, memasang, menguji dan memberi kerja sistem kabel berstruktur bagi sebahagian projek kerajaan ('projek tersebut'). Melalui satu surat award, responden kemudian memberikan subkontrak kerja-kerja tersebut kepada perayu. Perayu menerima tawaran responden untuk menghantar alatan sistem kabel seperti yang dinyatakan di dalam jadual kontrak di antara pihak-pihak dalam tiga ansuran. Terma-terma kontrak berkaitan dengan penghantaran adalah sepatutnya diikuti secara ketat dengan perayu bertanggungjawab bagi ganti rugi jumlah tertentu dan ditetapkan ('LAD') sebanyak RM4,000 sehari bagi ketidakpatuhan dengan terma-terma ini. Pelaksanaan responden terhadap tanggungjawab kontraknya di bawah kontrak tersebut dijamin oleh jaminan bank. Di bawah jaminan bank tersebut, responden sepatutnya membuat bayaran kepada perayu dalam tempoh 90 hari dari tarikh penghantaran alatan-alatan tersebut. Perayu menyatakan bahawa responden telah secara unilateral melanjutkan tarikh penghantaran daripada tiga ansuran kepada lima ansuran dan kemudian sering mengubah penerimaan penghantaran alatan tersebut. Perayu kemudian meminta jaminan bank dengan menyatakan

bahawa kegagalan responden menerima penghantaran alatan. Responden kemudian memulakan tindakan terhadap perayu kerana meminta jaminan bank. Adalah hujahan responden bahawa perayu tidak ada asas untuk meminta jaminan bank tersebut, kerana adalah penting bagi perayu menunjukkan jumlah yang dituntut adalah dihutang pada masa ia menuntut bayaran atas jaminan bank tersebut. Menurut responden, perayu tidak ada alatan yang sesuai untuk dihantar kepada responden. Adalah kes perayu bahawa ia tidak boleh melaksanakan tanggungjawabnya di bawah kontrak tersebut kerana permintaan kerap oleh responden untuk menukar dan menerima penghantaran. Perayu menghujah bahawa kegagalan responden menerima penghantaran bermaksud bahawa ia terpaksa berterusan menanggung kos penyimpanan alatan di gudang. Hakim bicara membuat penemuan memihak kepada responden dan maka rayuan ini.

Diputuskan, membenarkan rayuan dengan kos di Mahkamah ini dan di mahkamah Tinggi:

(1) Surat perayu meminta bayaran atas jaminan bank menyatakan kegagalan responden tidak dipertikaikan. Dengan itu tidak wajar bagi responden sekarang menafikan dan mempertikaikan kemungkiran pada pihaknya. Jelas dalam keadaan kes ini bahawa responden telah gagal dalam kewajipan kontraknya. Pada hakikatnya hakim bicara gagal menilai bahawa responden telah gagal untuk memanggil saksi langsung untuk mencanggah fakta kritikal yang menjurus kepada keengganan penerimaan penghantaran dan/atau ketidakbolehan untuk memenuhi atau meneruskan dengan kewajipan kontraknya. Hakim bicara juga gagal melihat kewujudan motif pada pihak responden bagi menahan dan menghalang penerimaan. Selanjutnya, walaupun dengan dapatan fakta yang dibuat memihak kepada perayu, hakim bicara tersalah arah dirinya apabila membuat keputusan sebaliknya (lihat perenggan 68, 73, 85 & 89).

(2) Responden, yang mendakwa bahawa perayu telah membuat tuntutan fraud atas jaminan bank, mempunyai beban membuktikan dakwaan fraud melampaui keraguan munasabah. Walau bagaimanapun, walaupun dengan beban tersebut di atas, hakim bicara menerima keterangan saksi-saksi responden atas imbangan kebarangkalian. Hakim bicara juga gagal menghargai bahawa responden telah gagal membuktikan bagaimana responden telah melakukan fraud (lihat perenggan 79–81 & 84).]

Notes

For a case on refusal to accept delivery, see 3(2) *Mallal's Digest* (4th Ed, 2011 Reissue) para 3152.

For cases on fact, finding of appeal, see 2(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 999–1117.

Cases referred to

Isito Electronics Sdn Bhd v Teh Ah Kiam & Anor [2004] 7 MLJ 517, HC (refd)
Yew Wan Leong v Lai Kok Chye [1990] 2 MLJ 152, SC (refd)

Appeal from: Civil Suit No D4–4299 of 1998 (High Court, Kuala Lumpur)

Chan Kah Meng (Chow Siew Wai with him) (Chooi Saw & Lim) for the appellant.
CJ Ooi (Raslan Loong) for the respondent.

Zainun Ali JCA (delivering judgment of the court):

[1] The respondent by a letter of award dated 16 April 1998, offered the defendant (appellant) a subcontract in relation to the supply, delivery and certification of a specific type of 'Structure Cabling Systems' for Phase 1A of the government complex development by Putrajaya Holdings Sdn Bhd which is part of a government project ('the work').

[2] The work is related to the contract for the supply, delivery, installation, testing and commissioning for the extra low voltage electrical services and all associated works for the proposed development of Phase 1a of the government complex development ('the project'). The several parties involved in the project are as follows.

[3] The main contractor in respect of the project is Fidelity Supplies Sdn Bhd. Fidelity then subcontracted the works to Destine Computers Sdn Bhd, which then subcontracted it to Brunsfield Information Technology (the respondent) which in turn then subcontracted the works to the appellant.

[4] The appellant accepted the respondent's offer on 27 June 1998.

[5] Appendix E of the letter of award provides a detailed account of the deliveries of the equipments by the appellant. The deliveries were to be made on three occasions ie on 7 July 1998, 14 July 1998 and 21 July 1998 respectively. The terms were to be strictly observed for failure to comply would result in the appellant being liable for liquidated and ascertained damages ('LAD') of RM4,000 per day.

[6] The equipments to be delivered by the appellant to the respondent are as set out in Appendix B, known as the 'Mod-Tap Products'.

[7] To secure the respondent's performance under the said letter of award, an unconditional or 'on-demand' bank guarantee (No GTE PJA 980995 dated 8 June 1998) was procured from Hong Kong Bank Malaysia Bhd ('the bank').

This is clear from the terms of the supplementary terms and conditions of the letter of award, which provides that payment for the equipment shall be made by the plaintiff to the defendant 90 days from the date for delivery and that payment shall be guaranteed by a mutually agreed bankers guarantee.

[8] It was not in dispute that the respondent had revised the delivery schedule for the equipment on three occasions, to the appellant.

[9] The first was by a letter dated 15 June 1998 where the respondent forwarded to the appellant a revised delivery schedule for the equipment.

[10] The second was by a letter for 1 July 1998 to the appellant, where the respondent forwarded a further revision to delivery schedule for the equipment.

[11] The third was by a letter of 9 July 1998 to the appellant, for a further revision to the delivery schedule for the equipment.

[12] Then by a letter of 20 July 1998, the respondent requested the appellant to withhold delivery of the equipment set out as items 2, 3, 4, and 5 in the list of equipment pending further notice. This same instruction was repeated in a letter dated 23 July 1998.

[13] A third letter dated 25 August 1998 requested the appellant to withhold the delivery of the equipment until the end of August 1998. The appellant's solicitors letter of 26 August 1998 indicated agreement to this request until 31 August 1998 and that the appellant will proceed thereafter, to deliver the equipment to the respondent.

[14] On 10 November 1998, the appellant's solicitors wrote to the respondent indicating that the respondent had unilaterally terminated the letter of award and thus had breached the terms of the letter of award for the sum of RM400,000.

[15] The appellant by letter of 11 November 1998 then called on the bank guarantee on the basis of the respondent having defaulted in the payment under the letter of award.

[16] The respondent disputed the appellant's call on the said bank guarantee. Thus on 20 November 1998 the respondent instituted action in the High Court.

[17] In view of the above, it would be instructive to begin with the

submission of the respondent.

THE RESPONDENT'S CASE

[18] It is the respondent's case that the appellant was under an obligation to deliver the equipment set out in Appendix B of the letter of award, in accordance with the delivery schedule set out in Appendix E, subject to variations as provided for by cl 3 of the supplementary terms and conditions set out in Appendix D (p 4 of 'B'). The respondent stated that such variations did take place during the period of the letter of award.

[19] The respondent contended that the bank guarantee is conditional and not otherwise. This is because the bank's liability thereunder is contingent upon the appellant showing that there are sums owing to it and the total amount of the said sums. The respondent further contended that it was incumbent upon the appellant to show that the sum claimed was owing to it at the time of making a call on the guarantee.

[20] In that connection, the respondent took issue with the appellant's statement as a fact that the respondent had failed or refused to accept delivery of the said equipment.

[21] The respondent contended that the LAD clause is applicable only between it and the appellant. Since the delivery obligation was subject to variation as provided for under cl 3 of the supplementary terms and conditions, the imposition of LAD would depend on the nature of variations made to the delivery schedule. The respondent contended that it made the various revisions in accordance with the delivery schedule and thus there was no question of imposing LAD on the appellant in adhering to the delivery schedule as varied.

[22] The respondent denied the claims made by the appellant's witnesses DW1 and DW2, that the respondent had abandoned the allegations of making a false or fraudent representations to the bank to claim on the bank guarantee and that the respondent had departed from its pleadings.

[23] The respondent contended that the appellant did not have the necessary equipment in hand in the first place, to deliver to the respondent on 7 July 1988, despite its letter on even date that the equipment was ready for delivery, since the supplier in its letter of 24 August 1998, had stated that the stock had been in its warehouse, waiting to be dispatched. Based on this fact, the respondent thus argued that the only contemporaneous document tendered to the court showed that the equipment was not in the appellant's possession as at 7 July 1998.

[24] Moreover, the respondent contended that though it requested the appellant to withhold delivery on three occasions, there was no formal protest from the appellant. The respondent contended that in fact the appellant actually agreed to withhold delivery of the equipment until 31 August 1998 as requested by the respondent. Thus it is the respondent's case that the appellant's contention of its strenuous protest (regarding the respondent's revision) must be properly weighed and considered; and in this light the respondent contended that it lacked credibility in view of the contemporaneous documents.

[25] The respondent refuted the appellant's contention that it required particulars from the respondent to deliver the equipment to it, to which the respondent did not respond. The respondent's case is that the appellant, for all its alleged threats and protestations, had not, until now delivered to the respondent. The respondent further contended that in fact the appellant had called on the bank guarantee on 11 November 1998, even before issuing the letter dated 11 November 1998 to the respondent.

[26] Thus the respondent's contention is that it is not so much for the respondent to show that the appellant had failed to deliver the equipment prior to and until the commencement of the legal action, as it is for the respondent to show that the appellant did not have a basis for calling on the bank guarantee on 11 November 1998, since the appellant had not established that the respondent had refused to accept delivery. It is also the respondent's case that in all probability the appellant did in fact consented to the deferment of the delivery schedule.

[27] The respondent stressed that the issue is that when it had failed or refused to accept delivery on the date in question, the appellant, without more, called on the bank guarantee. The respondent stated that not only did it NOT fail or refuse to accept delivery of the equipment as at 11 November 1998, the respondent never failed or refused to accept delivery of the equipment as evidenced by its subsequent request of 18 January 1999 to the appellant to deliver the same.

[28] As regards certification of the Mod-Tap products, it is the respondent's contention that cl 7 of the letter of award did not state that certification by the manufacturer is to take place only after the installation of the equipment.

THE APPELLANT'S CASE

[29] It is the appellant's case that under the terms of the contract between the respondent and the appellant, the appellant is to deliver the equipment in accordance with the schedule and the respondent is to pay the appellant within

90 days from the date of delivery. However the appellant contended that it was unable to deliver the said equipment solely due to the constant requests by the respondent to defer and receive delivery. The respondent made no less than three such requests ie on 7 July 1998, 14 July 1998 and 21 July 1998 respectively. The appellant's contention is that the respondent's action of constant deferment of accepting delivery of the equipment caused grave difficulty to the appellant in executing its job of supplying, delivering and certificating the structural cabling system.

[30] One of the appellant's witnesses, one Mr Chin Chee Kong who is the project manager, testified that the appellant called up the respondent a number of times for delivery to be executed and for the delivery order and invoice to be signed, but that the persons who answered him (Mr Yeoh or Mr Gan) would keep on asking the appellant to hold on not to deliver just yet (see p 122 of the appeal record).

[31] Mr Chin's testified and reiterated that under the contract the appellant's job was to supply, deliver and certify the structural cabling system.

[32] However the job of certification could not be done by the appellant for this simple fact — that the certification process can take place only when the appellant installed the material with the fresh panel, fresh plate, fresh cord and fibre cable to the site and these are all then to be tested by them.

[33] Thus the job scope of the appellant would be to do the above, whilst the respondent's job is to verify whether the point and the workmanship is correct so that a report can be submitted back to Mod-Tap Malaysia. The latter will submit the report and certification to Mod-Tap USA which will then issue the letter of warranty. But none of these can be done if the respondent do not take delivery of the equipment in the first place.

[34] The appellant also refuted the respondent's allegation that the appellant had not protested the respondent's constant revision of the date for delivery.

[35] Through Mr Chin, the appellant refuted the said allegation of non-protestation. In fact it was Mr Chin's contention that the appellant had made the entire Mod-Tap (see B-28, Mod-Tap's letter dated 16 June 1998, where B28–29 is the confirmation of the entire Mod-Top order) order because it is cheaper that way; and because of this bulk order, the appellant had to stock them in the warehouse since July. In that connection, Mr Chin went on testify that the failure of the respondent to take delivery meant that the appellant had to continue to pay the holding costs in the warehouse plus interests etc (see p 123 of the appeal record).

[36] According to Mr Chin the products are imported from various parts of Australia or Hong Kong though some are locally produced. Based on the above facts, the appellant's view is that the respondent's contention thus fall on thin ground. A

[37] After having heard submissions and read evidence of both sides, the events giving rise to this appeal fall within a fairly narrow compass. The critical factors to be considered are these. B

[38] Under the said project, under the directive of the Prime Minister's office, contractors were required to comply with the scheduled time and no variation would be permitted unless it came from Teamstead Sdn Bhd and Putrajaya Holding Sdn Bhd (ie the owners of the said office project) (this was part of cl 3 of the supplementary terms and conditions and contract). C

[39] To ensure performance of the contractual obligations on the appellant's part, it was agreed that the liquidated and ascertained damages (LAD) of RM4,000 per day would be imposed on the appellant in the event of delay (see cl 2 of supplementary terms and conditions p 4 of common bundle of documents and item (f) in letter of award dated 16 April 1998). D E

[40] It was also agreed that upon the execution of the said contract the appelant must immediately commence the contracted job and any delay would cause the appellant to pay a penalty of RM4,000 per day. To do this the appellant must incur expenses upfront in procuring the necessary equipments from overseas and take the risks of securing those equipments with letters of credit, since these equipments are special equipments in that there is no ready market for it domestically in Malaysia. Thus the risks are heightened since non-performance by the respondent would cause tremendous losses to the appellant. So it is imperative that the respondent (who had agreed to provide a bank guarantee) ensure due performance of its contractual obligations under the said contract. F G

[41] Looking at the terms of the bank guarantee, it is our view that it was intended to be an 'on-demand guarantee'. H

[42] Looking again at the letter of award and Appendix E, under the material and equipment delivery schedule, it is crucial to determine under the contract what was the time line in which the appellant had to deliver to the Mod-Tap products. I

[43] It could be seen that under the contract the appellant had to deliver them (the Mod-Tap products) in three deliveries/installments ie on 7 July 1998, 14 July 1998 and 21 July 1998 respectively. As could be seen, the

delivery dates were one week apart from each other, which means that the supply of all the Mod-Tap products must be secured by the appellant within a short period of time and under these circumstances, the supplier would require letters of credit to secure against high business risks.

[44] It is the appellant's case that even before the first delivery ie on 7 July 1998, at the respondent's request, the appellant had delivered to the respondent part of the Mod-Tap products which amounted to RM24,000. This was done so that the respondent could examine the products and satisfy itself of the quality of the same. This would also ensure that the respondent would be confident that the appellant would be able to fulfill its contractual obligations.

[45] The appellant's further contention in that it had complied with its contractual obligations by ordering the Mod-Tap products for the first delivery on 7 July 1998 (see pp 28–30 common bundle of documents — appear to be in order).

[46] The above facts were strengthened by a letter from Mod Tap (Malaysia) Sdn Bhd to Setia Putrajaya Sdn Bhd informing the latter that 35% of the items had been delivered to the appellant since July 1998 (p 1 of the additional common bundle of documents).

[47] It is the appellant's case that the first delivery of the equipment did not take place since the respondent had refused or failed to accept delivery of the same. The respondent issued a letter dated 1 July 1998 to that effect and gave a purported revised schedule.

[48] Contrary to the respondent's assertion, the appellant's case was that it protested against the purported revised schedule for the following reasons:

(a) The Mod-Tap products were secured by letters of credit. The purported revised schedule withholding delivery of most of the Mod-Tap products for the first delivery had the consequence of causing critical cash flow problems to the appellant, resulting in the appellant being in default in paying the supplier.

(b) Non-payment to the supplier has the effect of the letters of credit being invoked which would have a detrimental impact on the appellant's reputation as well as its debtor's credit with the suppliers.

[49] In view of the above the appellants case is that the purported revised schedule was made by the respondent unilaterally, without authority or permission from the owners of the said development project. The appellant would not have agreed to the said revision since any delay in delivery would cause the appellant a penalty of RM4,000 per day in LAD since there was no

indication from the owner of the said project to the appellant that no penalty would be imposed for non-compliance with the purported revised schedule. A

[50] It is the appellant's case that the matter was exacerbated with there being no explanation given to the appellant by the respondent for revising the delivery schedule. B

[51] Due to the respondent revision of the delivery and despite the appellant protests, the delivery did not take place.

[52] The respondent then sent a second revised schedule, vide its letter of 9 July 1998 to the appellant (pp 34–35 of the appellant's bundle of documents). C

[53] It is the appellant's case that the respondent's second schedule meant that the respondent had unilaterally extended the delivery dates from three installments to five installments ending on 24 August 1998. D

[54] The appellant contended that their protestations were not taken seriously by the respondent.

E

[55] In fact the respondent then issued a FURTHER request to the appellant in a letter dated 20 July 1998, to request the appellant to withhold delivery of the Mod-Tap products. In fact this letter made matters worse, when it was silent as to when the date of delivery would be (p 102 in the common of bundle). F

[56] Then on 23 July 1998, the respondent issued another letter to the appellant requesting that delivery of the Mod-Tap products be withheld (p 103 in the common of bundle).

G

[57] The appellant issued a letter of complaint dated 4 August 1998 in reply.

[58] The situation worsened when on 7 August 1998 the respondent issued another letter of request to the appellant to withhold the first delivery of the Mod-Tap products. To compound the problem, the respondent even requested the appellant's to withhold the ordering of further deliveries (see pp 105–106 in the common of bundle). H

[59] The appellant's case is that it never agreed to the withholding of delivery since its position is clear in that it wanted to comply strictly with the terms of the contract at all times. I

[60] The record showed that when the respondent's letter of 7 August 1998

was issued (to withhold delivery), there was already a stop work order given by Destine Computers Sdn Bhd to Fidelity Supplies Sdn Bhd (p 104 of the common of bundle). This meant that the respondent, being the sub-contractor for Destine Computers Sdn Bhd, had also lost the subcontract work and could not accept any delivery of Mod-Tap products anymore.

[61] However, the respondent did not disclose this fact to the appellant (in its 7 August 1998 letter).

[62] The respondent in fact, pretended as if there was no problem at all with the contract and continued the charade — so much so that when the appellant sent a fax on 21 August 1998. to the respondent, reminding the respondent of the amount of Mod-Tap products which were ready for delivery by the appellants, the respondent went on with this pretense by requesting the appellant to withhold delivery of the Mod-Tap products vide its letter dated 15 August 1998.

[63] The respondent's action above was clearly self-serving. The respondent's performance of its contractual obligation under the contract was secured by the bank guarantee. It was therefore in its interest that its inability to perform its part of the contractual obligation not be revealed, for it ran the risk of entitling the appellant to call on the bank guarantee immediately.

[64] In view of the 'piling up' of the Mod-Tap products in the warehouse (due to the respondent's refusal to take delivery), the appellant issued its solicitor's letter dated 26 August 1998 to the respondent to place on record that it had never agreed nor condoned the respondent's breach in failing or refusing to accept the appellant's delivery of the Mod-Tap products. The said letter also indicated that should there be any further delay of taking delivery by the respondent, losses and damages would ensue. The appellant thus urged the respondent to take delivery by 31 August 1998.

[65] There was no answer from the respondent on the appellant's letter above.

[66] It was only on 7 November 1998 that the respondent's representatives, Mr Gan Thin Gee and Mr Yap Cheng Hong met with the appellant's project manager Mr Chin Chee Kong and Mr Yeoh Kim Wah, the appellant's marketing director.

[67] At this meeting, the respondent proposed to call off the contract by offering to the appellant the sum of RM10,000 as compensation. It was rejected by the appellant in view of the value of the Mod-Tap products being

worth approximately RM1.44m. There was a counter-proposal by the appellant which was not accepted by the respondent.

[68] It is clear thereafter, in the circumstances of this case that the respondent had defaulted in its contractual obligations. This and the existing stop work order between Destine Computer Sdn Bhd and Fidelity Supplies Sdn Bhd made it clear to the appellant where the land lies. The appellant also realised that the bank guarantee would lapse or expire some time in January 1999. The appellant then instructed its solicitor to write to the respondent on 10 November 1998 to inform the respondent and the bank that the respondent's default in failing or refusing to accept the appellant's delivery had caused it losses and damages exceeding RM400,00 and that the appellant would proceed to take necessary steps to protect its interests against the losses and damages it suffered as a result of the respondent's breach.

[69] The respondent protested and through its solicitor wrote to the bank on 13 November 1998 demanding that the money under the bank guarantee not be released.

[70] The appellant's rebuttal was swift. It contended that the Mod-Tap goods piling up in the warehouse amounted to RM400,129 and on top of that the respondent had failed to pay for the earlier delivery of the Mod-Tap products amounting to RM24,000.

[71] It must be borne in mind that the respondent had requested the appellant to withhold delivery of the equipment until 31 August 1998.

[72] But of course as events had shown, that date passed by without any word from the respondent to ask the appellant to deliver the goods.

[73] The appellant's letter of 11 Novemebr 1998 making a call on the bank guarantee citing the respondent's default was not disputed. It is not open for the respondent to now deny and dispute breach on its part.

[74] The period falling for the court's determination was limited between 31 August 1998 to 11 November 1998 (ie the date of the call of the bank guarantee).

[75] From the court records it has been exhaustively displayed through various letters how the respondent had never confirmed the acceptance of delivery. It is also a fact that there was no attempt on its part to accept delivery of the contracted equipment.

[76] On 20 November 1998, the respondent filed an action and secured an ex-parte order on 24 November 1998, inter alia, to restrain the appellant from receiving payment of the sum of RM400,000 from the bank. It contended that the security of the bank guarantee lapsed on 7 December 1998. The respondent's agreement that it had made demands for delivery on the *18 January 1999* was clearly unsustainable (being outside the date of 7 December 1998). Moreover the dispute between parties was already before the court by that date (18 January 1999). In fact this demand was not a pleaded fact or issue. It is trite that parties are bound by their pleadings (*Isito Electronics Sdn Bhd v Teh Ah Kiam & Anor* [2004] 7 MLJ 517; *Yew Wan Leong v Lai Kok Chye* [1990] 2 MLJ 152). (Emphasis added.)

[77] In fact when the respondent gave the appellant the notice as to time and place for delivery on 18 January 1999, the appellant requested that it be furnished with an additional bank guarantee for the balance of the products to be delivered. The appellant's request was refused by the respondent who then purported to treat the appellant as having repudiated the letter of award and that the respondent accepted the repudiation.

[78] The respondent's inter parties application for an interlocutory injunction was proceeded with but that was denied on 27 July 1999 and subsequently the bank released the sum of RM400,000 on 11 August 1999 to the appellant, amidst protests by the respondent.

[79] One of the respondent's allegations against the appellant was that it had made a fraudulent claim on the bank guarantee.

[80] This allegation of fraud was by the respondent and on it lies the burden of proving it beyond a reasonable doubt.

[81] However the learned trial judge, notwithstanding the above burden, accepted the evidence of the respondent witnesses on a balance of probabilities.

[82] The learned trial judge made findings of fact of delay on the respondent's part in accepting delivery between 31 August 1999 to 11 November 1998. The learned judge also found that there was breach on the respondent's part.

[83] This can be seen when the learned trial judge concluded that in the face of the respondent's refusal to accept delivery between 31 August 1998 to the 11 November 1998, causing delay and breach and rejecting the respondent's submission, *the obligation to pay became due only upon delivery and that the failure of delivery by the appellant could not amount to it being a fraudulent claim*

(on the appellant's part) on the guarantee. The learned trial judge however failed to appreciate the burden of proof on the respondent's part to negate the appellant's claim. (Emphasis added.)

[84] The learned trial judge also failed to put issues of fraud and/or dishonest intention to the appellant's witness. The learned trial judge had not shown how and in what manner the respondent had failed to establish how the appellant had been fraudulent. In fact the learned trial judge did not consider the question as to why the respondent did not put questions of fraud and dishonesty to the appellant's witnesses.

[85] In fact the learned trial judge failed to appreciate that the respondent had failed to call direct witnesses to contradict critical facts pointing to the refusal to accept delivery and/or inability to complete or proceed with the contractual obligations. The learned trial judge failed to appreciate that the meeting of 9 November 1998 had established the respondent's intention not to honour the obligation and/or reimbursing the appellant in the sum of RM10,000 and the existence of motive on the respondent's part for withholding and refraining acceptance which is manifest in the stop work order issued by Destine Computers Sdn Bhd.

[86] The learned trial judge failed to appreciate that the substance of the respondent's claim is not for losses for breach of contract since they were not complaining of real contractual losses from alleged failure of delivery. The respondent's real complain was loss in the payment for the goods (via the bank guarantee). This was not appreciated at all by the learned trial judge. More importantly, the learned trial judge failed to appreciate that the respondent had failed to prove liability on the appellant's part and losses on its part.

[87] In fact the learned trial judge's decision spoke of post November 1998 events ie delivery after 18 January 1998. This is a non-issue since these issues were not before the court.

[88] Thus we agree with learned counsel for the appellant that the declaratory relief asked for is now rendered academic.

[89] Our decision is unanimous. We found that despite the findings of fact that the learned trial judge made in the appellant's favour, the learned trial judge misdirected himself when he ruled otherwise. As a result, we allow the appeal with costs. Costs (here and below) are to be paid to the appellant in the global sum of RM15,000.

[90] Note: Since the appellant had made payment of RM582,025 on 19

June 2005 (receipt shown to the court) in satisfaction of the order of the learned trial judge, consequential order of refund is to follow. The deposit is to be refunded to the appellant.

Appeal allowed with costs here and below.

Reported by Kohila Nesan